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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

CONSULATE GENERAL OF NIGERIA and
FEDERAL REPUBLIC OF NIGERIA,
Petitioners,

vs.

CATHERINE JOSEPH,
Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN H. ASPELIN
120 Montgomery Street, Suite 710
San Francisco, California 94104
(415) 781-7400
Counsel for Respondent

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SUMMARY OF ARGUMENT

The petition for writ of certiorari fails to meet the standards for review contained in Sup. Ct. Rule 17.1. Petitioners fail to show any conflicts among the courts of appeals under any of the three exceptions to sovereign immunity of the Foreign Sovereign Immunities Act (28 U.S.C. § § § 1330, 1441(d) and 1602 et. seq.) (hereinafter F.S.I.A.) which the Court of Appeals found applicable in this case. These are the implicit waiver exception [28 U.S.C. §1605(a) (1)]; the commercial activity exception [28 U.S.C. § 1605(a) (2)]; and the noncommercial tort exception [28 U.S.C. § 1605(a) (5)].

The decision below was correctly decided on all three of the aforementioned exceptions to sovereign immunity. The finding of jurisdiction under the implicit waiver exception was one of first impression. It was a logical interpretation of the statute under the facts of this case. The finding of jurisdiction under both the commercial activity exception and the noncommercial tort exception are in accord with existing case law and the legislative history.

I. STANDARD FOR REVIEWING PETITIONS FOR WRIT OF CERTIORARI

The considerations governing review of petitions for writ of certiorari are found in Sup. Ct. Rule 17.1. The petition for writ of certiorari fails to meet these criteria because there are no conflicts on the issues decided below between the courts of appeals. Further, there is no need for this Court to exercise its power of supervision. The decision below, an interlocutory judgment affirming jurisdiction in the District Court, does not raise important questions of federal law which should be decided by this Court.

II. PETITIONERS FAIL TO SHOW ANY CONFLICTS AMONG DISTRICT AND CIRCUIT COURTS REGARDING IMPLICIT WAIVER OF SOVEREIGN IMMUNITY

There is no conflict between the courts of appeals on this matter because the issue of implicit waiver of sovereign immunity in this case is one of first impression. No previous case has interpreted a lease or contract containing a right of judicial enforcement between the parties under the implicit waiver clause of the F.S.I.A., 28 U.S.C. 1605(a) (1). Neither arbitration agreements, nor contracts citing a specific state's governing law are involved.

Both *Marlowe v. Argentine Naval Commission* 604 F.Supp. 703, 708 – 709 (D.C.D.C. 1985) and *Resource Dynamics International v. General People's Committee* 593 F.Supp. 572, 575 (N.D.GA. 1984) cited by petitioner, merely acknowledge what was stated in the H.R. Rep. No 94-1487, 94th Cong. 2nd Sess. 18, reprinted in 1976 U.S. Code Cong. & Admin. News 6604, 6617, where it was stated,

> "With respect to implicit waivers, the courts *have found* such waivers in cases where the foreign state has agreed to arbitration in another country or where a foreign state has agreed that the law of a particular country should govern a contract"
> (emphasis added)

Nothing in *Marlowe, Resource Dynamics* or the House Report limit the finding of implicit waiver to those instances.

A second reason why there are no conflicts between the courts of appeals on this matter is that both *Marlowe* and *Resource Dynamics* are district court decisions. Even if there were a conflict, the decision below would not be ". . . in conflict with the decision of another federal court of appeals on the same matter;. . . " [Sup. Ct. Rule 17, 1(aa)].

A. The Exercise of This Court's Power of Supervision Is Not Required

Petitioners' desire to have this Court provide specific statutory construction of the implicit waiver of immunity clause of the F.S.I.A. is both unnecessary and unworkable. As is stated in 5 *Benders Fed. Prac. Forms* at 194 citing papers used in connection with *Peck v. U.S. Steel Corp.* 315 F.Supp. 905 (D.C. MN. 1970); 446 F.2d 891 (8th Cir. 1971) *cert. denied* 404 U.S. 1019:

> ". . . it is legally impossible to arrive at a final and ultimate solution which will anticipate all future problems and factual situations. Courts always have and always will have some problems in the application of legal principles, howsoever well settled, to varying sets of facts."

Respondent submits that there is no conflict between the courts of appeals regarding the implicit waiver of sovereign immunity found in this case. Respondent further submits that there is no need for statutory interpretation by this court of this clause at this time.

III. THE ISSUE OF THE AUTHORITY OF A CONSULAR OFFICER TO WAIVE SOVEREIGN IMMUNITY IS NOT PROPERLY BEFORE THE COURT

The issue of the consular officer's authority to waive sovereign immunity by signing a lease was mentioned but not argued by petitioners in the Court of Appeals. (Petitioners' Opening/Answering Brief before the Court of Appeals merely states at page 40, "There is absolutely no evidence that Nigeria intended to waive immunity by the Consulate's rental of residential property, nor is there evidence that the consular officer who signed the lease had authority to waive immunity on behalf of the sovereign.")

Petitioners have not preserved this issue for appeal and the issue is not properly before this Court.

Furthermore, petitioners' unsupported assertion that the consular officer lacked authority to sign the lease agreement raises a question of fact, which should be plead as an affirmative defense by petitioners if and when they answer the complaint.

A. The Decision Below is Correct

The Court of Appeals correctly decided that an implicit waiver of immunity occurred when an officer of the Federal Republic of Nigeria signed the lease which provides that disputes arising under the lease would be subject to judicial resolution. The officer was empowered to enter into contracts on behalf of his government and possessed both real and apparent authority.

Respondent submits that the Court of Appeals correctly decided that an implicit waiver of immunity has occurred.

Furthermore, petitioners have not preserved this issue, a question of fact, for review by this Court.

IV. THE COMMERCIAL ACTIVITY EXCEPTION IS CORRECTLY DECIDED

The activity held to be commercial by the Court of Appeals was the leasing of residential property to be used as housing for consular officers, employees and family members. The breach of that lease agreement were the acts of non-payment of rent, damage to the leasehold and holding over.

The legislative history supports finding the leasing of property a commercial activity. [See House Report at 6615, cited in part with approval in *McDonnell Douglas v. Islamic Republic of Iran* 758 F.2d 341, 348 (8th Cir. 1985); and Hearings on H.R. 11315 Before the Subcommittee on Admin. Law & Govt. Relations of House Committee on the Judiciary, 94th Cong. 2nd Sess. 28 at 51 (1976) also cited in *Chisholm & Co. v. Bank of Jamaica* 643 F.SuppL 1393, 1399 (S.D. Fla. 1986)].

Case law establishes numerous activities by foreign governments as commercial. [See *McDonnell Douglas Corp. v. Islamic Republic of Iran* 758 F.2d 341, 348 (8th Cir. 1985) (contract to purchase equipment for armed services); *Meadows v. Dominican Republic* 628 F.Supp. 599, (N.D.CA. 1986) (contract to pay commission for obtaining a loan); *Behring International v. Imperial Iranian Air Force* 475 F.Supp. 383, 388-390 (D.N.J. 1979) (contract with Iranian Air Force with U.S. freight forwarder); *Banker Trust Co. v. Worldwide Transportation Services* 537 F.Supp. 1101, 1106-1108 (E.D. Ark. 1982) (purchase of U.S. agricultual commodities by agency of Mexican government for purposes of price stabilization); and *United Euram v. Union of Soviet Socialist*

Republics 461 F.Supp. 609 (S.D.N.Y. 1978) (contracts executed in U.S. as part of a cultural exchange).]

A. The Cases Cited By Petitioners Regarding Commercial Activity Are Distinguishable

Both *Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes* 336 F.2d 354 (2nd Cir. 1964), *cert. den.* 381 U.S. 934 and *Heaney v. Government of Spain* 445 F.2d 501 (2nd Cir. 1971) are pre- F.S.I.A. cases and therefore not relevant. [See *United Euram Corp. v. Union of Soviet Socialist Republics* 461 F.Supp. 609, 611 - 612 (S.D.N.Y. 1978)]

MacArthur Area Citizens Association v. Republic of Peru 809 F.2d 918 (D.C.Cir. 1986) amended on other grounds 823 F.2d 606 (D.C. Cir. 1987) involved complaints by neighbors that Peru's operation of a chancery violated local zoning laws. No contract was involved. The court found that the operation of a chancery did not come under the commercial activities exception.

Both *United States v. Arlington* 669 F.2d 925 (4th Cir. 1982) *cert. den.* 459 U.S. 801 and *City of Englewood v. Socialist Libyan Arab Jamahiriya* 773 F.2d 31 (3rd Cir. 1985) involved attempts to tax buildings owned by foreign governments. In *U.S. v. Arlington* the United States gave the foreign government a tax exemption. In neither case was there a contract between the taxing authority and the foreign government. In both cases property was acquired by purchase. Both courts acknowledged that the acquisition of property is a commercial activity under the F.S.I.A.

In the present case the property was "acquired" by a lease agreement. A lease involves continuing contractual obligations. There is a written agreement between the parties.

Ownership remained with the respondent. Just as a breach of a purchase agreement creates a basis for jurisdiction under the commercial activity clause in both *U.S. v. Arlington* and *City of Englewood* supra, so too does the breach of a lease agreement create a basis for jurisdiction as commercial activity in this case.

B. Noncommercial Torts Do Not Preclude a Finding of Commercial Activity

Petitioners would have the Court rule that a finding of commercial activity excludes the possibility of finding a noncommercial tort. There is no authority for such an assertion. It is certainly not unusual for a breach of a lease to also result in claims for tortious conduct against the residents of the leasehold. Petitioners' liability in tort is found in the doctrine of respondeat superior, which creates liability"(5) not otherwise emcompassed in paragraph (2)" (the commercial activities exception). [28 U.S.C. 1605(a) (5)]

Respondent submits that the Court of Appeals has correctly decided that the leasing of residential property is a commercial activity under the F.S.I.A. The cases cited by petitioners are clearly distinguishable. The finding of a commercial activity under the F.S.I.A. does not preclude the finding of a noncommercial tort.

V. THE COURT OF APPEALS RULED CORRECTLY THAT THE NONCOMMERCIAL TORT EXCEPTION APPLIES

Both the Court of Appeals and the District Court ruled that the noncommercial tort exception of 28 U.S.C. 1605(a) (5) applies to deprive petitioners of immunity. California Law governs the determination of scope of employment.

[See *Skeen v. Federative Republic of Brazil* 566 F.Supp. 1414, 1417 (D.C.D.C. 1983); and *Joseph v. Office of the Consulate General of Nigeria* 830 F.2d 1018, 1025 (9th Cir. 1987)].

Petitioners argue that the Ninth Circuit gave too broad an interpretation to California case law defining foreseeability as a requirement of imposing liability on an employer under the doctrine of respondeat superior. Yet the relevant cases, including decisions of the California Supreme Court [*Perez v. Van Groningen & Sons, Inc.* 41 C.3rd 962, 227 Cal. Rptr. 106, 719 P.2d 676 (1986)] clearly support the decision below, even where intentional torts are involved. [See in this regard, *Warshauer v. Bauer Construction Co.* 179 C.A.2d 44 (1960) (builders' agent absconded with money paid as a down payment); *Union Oil Co. v. Mutual Oil Co.* 19 C.A. 2nd 409 (1937) (principals liable for agent's trespass and conversion of oil by slant drilling on neighboring property); *Alhino v. Starr 112 C.A.3d 158 (1980) (broker liable for fraud committed by agent in sale of property); Dawes v. Superior Court* 111 C.A.3d 82 (1980) (corporation liable for punitive damages for acts committed by managerial employee within scope of employment).]

At page 10 of their petition, petitioners cite three additional cases holding employers liable for the intentional torts of their employees.

Petitioners fail to cite any authority for their claimed "general rule" that employers are not liable for the intentional torts of their employees. In fact, the general rule is that employers *are* liable for malicious acts and intentional torts of employees committed within the scope of employment

[2 *Witkin Summary of Cal. Law* 9th Ed 135].

Petitioners reliance on *Skeen v. Federative Republic of Brazil, supra,* to create a conflict between jurisdictions, is misplaced. First, *Skeen* is a district court decision. Second, the doctrine of respondeat superior under the F.S.I.A. involves a determination of state law or, in the case of *Skeen,* the District of Columbia, [*Skeen* 566 F.Supp. 1414, 1417-1418 (D.C.D.C. 1983)]. Ergo, conflicts between jurisdictions are to be expected when decisions are based on state law.

Third, the case is distinguishable on the facts. In *Skeen,* it was not foreseeable that an ambassador's grandson would shoot a victim outside a nightclub. In the present case, property was leased as a residence for consular officials, employees and families for a five year period. Residing there was part of the job. Eight and as many as ten or eleven children were observed in the house. The families changed during the lease term. It is clearly foreseeable that damage to property will occur under these circumstances.

The Court of Appeals and the District Court were correct in finding that the noncommercial tort exception applies in this case.

CONCLUSION

The Ninth Circuit Court of Appeals has correctly ruled that the District Court has three separate grounds for asserting jurisdiction over petitioners. In order to avoid a trial on the merits, petitioners would have to show that all three of these grounds for exercising jurisdiction were incorrectly decided.

Petitioners have failed to show any conflicts between the circuits on any of the issues. The decision reached is well withing the scope fo existing interpretations of the F.S.I.A. and applicable state law. Under these circumstances the petition for writ of certiorari should be denied.

Respectfully submitted,

JOHN H. ASPELIN
120 Montgomery Street Suite 710
San Francisco, California 94104
(415) 781-7400
Attorney for Respondent

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